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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1960.

No. 612

DUANE F. LEE and MARGARET LEE,

Petitioners,

vs.

TERMINAL TRANSPORT COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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For The Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

This petition seeks review of the second opinion of the Court of Appeals for the Seventh Circuit in *Lee* v. *Terminal Transport Company, Inc.*, reported in 282 F. 2d 805 and reprinted in full as Appendix I to this Petition.

That opinion affirmed a decree for injunction of the District Court for the Northern District of Indiana, Hammond Division, that is not reported, but is reprinted as Appendix II to this petition.

An earlier opinion of the Court of Appeals for the Seventh Circuit in this case is reported in *Lee* v. *Terminal Transport Company, Inc.*, 269 F. 2d 97, and is reprinted in full as Appendix III to this Petition.

The original judgment of the District Court in this case is not reported and is reprinted as Appendix IV to this Petition.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Date Of The Judgment Sought To Be Reviewed.

The date of the judgment sought to be reviewed and the time of its entry was September 27, 1960. No petition for rehearing was filed.

The Statutory Provision That Confers Jurisdiction On This Court.

The statutory provision that confers jurisdiction on this court to review the judgment of the Court of Appeals in this case is Section 1254 of the United States Code, which authorizes this Court to review by *certiorari*, any final judgment of a United States Court of Appeals in a civil case when a petition for certiorari is filed within ninety days from the date of the rendition and entry of the judgment.

THE QUESTIONS PRESENTED.

1. The United States District Court for the Northern District of Indiana has enjoined Petitioners from prosecuting a suit commenced by them in the Superior Court of Cook County, Illinois, for interest claimed under an Indiana statute upon two judgments of the Indiana District Court in Petitioners' favor, one for One Hundred Thousand Dollars and one for Three Thousand Dollars, and restraining Petitioners from instituting any similar suits in any court other than the District Court for the Northern District of Indiana. The judgments do not explicity provide either that they shall or that they shall not bear interest.

The opinion, judgment and mandate of the Court of Appeals were silent as to any matter of interest.

The district court held that it was the only forum in which the judgments might be construed as bearing or not bearing interest but did not decide that question. The Court of Appeals held that its first opinion, judgment and mandate, although mute upon the question of interest, was *res judicata* that Petitioners were not entitled to interest because the Court of Appeals had not declared that they were entitled thereto.

Did the district court in Indiana have jurisdiction to enter this decree under Section 2283 of the Judicial Code (28 U.S.C.A., Sec. 2283)?

2. If the district court had that jurisdiction, did it, nevertheless in granting the injunctive decree either

(a) Because any court of general jurisdiction in Illinois or elsewhere has inherent power under the full faith and credit clause (Article IV, Section 1 of the Federal Constitution) to enforce and therefore to construe when necessary, a judgment rendered in a sister State.

(b) Because the Indiana statute, properly construed and applied with respect to this case, reads into the judgments a provision for interest "at the rate of six (6) per cent per annum" from "the date of the return of the verdict(s)" in this case?

3. Did the Court of Appeals for the Seventh Circuit err in holding that its first opinion, judgment and mandate in this case were *res judicata,* that Petitioners are not entitled to interest when the opinion, judgment and mandate were silent upon any question of interest, and the question had not been raised in or presented to that court?

THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES.

The Full Faith And Credit Clause Of The Constitution Of The United States.

Art. IV, Sec. 1 of the Constitution of the United States provides in pertinent part as follows:

> "Full faith and credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State.

The Indiana Statute On Interest.

The Indiana Statute on interest is as follows:

> "Interest on judgments for money, whenever rendered, shall be from the date of the return of the verdict or finding of the court, until the same is satisfied * * * at the rate of six (6) per cent per annum." (Burns Indiana Statutes Annotated, Vol. V, Part 2, Section 19-2002)

The Federal Statute concerning interest on judgment for federal courts is as follows:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court, execution therefor may be levied by the Marshal whereby the laws of the State in which such court is held execution may be levied on interest on judgment recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment at the rate allowed by State law." (28 U.S.C.A., Section 1961)

A CONCISE STATEMENT OF THE CASE.

This case involves the questions of pure law delineated above and deemed by Petitioners to be of sufficient moment to the national jurisprudence to elicit this court's writ of certiorari and discussed under it.

On April 3, 1953, Petitioners, husband and wife, were injured in an automobile accident in Indiana by a truck operated by Respondent. In 1954, they brought this suit in the United States District Court for the Southern District of Florida to recover for their injuries, grounding Federal jurisdiction upon diversity of citizenship, and the presence of the jurisdictional amounts under Section 28 of the United States Code (28 U.S.C.A., Sec. 1332). The case was transferred to the Northern District of Indiana under Section 1404(a), of the Judicial Code (28 U.S.C.A., Sec. 1404(a)).

On March 18, 1958, "a jury returned verdicts for plaintiffs for $100,000 and $3,000 respectively, whereupon the court entered judgment for defendant notwithstanding the verdicts. Upon appeal, we reversed this judgment and remanded the case to the district court with instructions to reinstate the verdicts. *Lee* v. *Terminal Transport Co.*, 269 F. 2d 97."

It is to be noted that on March 18, 1958, the District Court entered judgments contemporaneously with these verdicts. The text of the judgments is very important and is as follows:

Entry for March 18, 1958.

Pursuant to the verdicts of the jury, judgment is now entered for the plaintiff Duane F. Lee, against the defendant, for the sum of $100,000;

Judgment is further entered for the plaintiff Margaret Lee, against the defendant, for the sum of $3,000.

Luther M. Swygert
Judge.

Petitioners took an appeal from this judgment to the Court of Appeals for the Seventh Circuit. Neither Petitioners nor Respondent raised or debated any question as to whether respondent was liable for interest upon these verdicts.

But a statute of the State of Indiana (Burns Indiana Statutes, Annotated, Vol. V, Part 2, Sec. 19-2002), correctly quoted by the Court of Appeals, provided:

> "Interest on judgments for money, whenever rendered, shall be from the date of the return of the verdict or finding of the court, until the same is satisfied * * * at the rate of six [6] per cent per annum."

Under the law of Indiana, it is clear beyond peradventure that a judgment of a State court in Indiana bears interest at the statutory rate of 6 per cent per annum on the verdict, *even though the judgment is silent as to any matter of interest.*

On June 29, 1959, the Court of Appeals "reversed the District Court's judgment for Respondent notwithstanding the verdict, remanding the case to the district court with directions that the district court reinstate the verdicts of the jury. *Lee* v. *Terminal Transport Company, Inc.*, 269 F. 2d 97 at p. 99, Appendix III, p. 29 *post*."

The opinion of the Court of Appeals was silent, as was that court's judgment, concerning any matter of interest.

Respondent's Petition for Rehearing was denied on July 31, 1959.

"This court's mandate issued accordingly and, on September 9, 1959, the district court vacated its prior judgment and, pursuant to the verdicts, entered judgment that plaintiff Duane F. Lee recover of defendant the sum of $100,000 and costs, and that plaintiff Margaret Lee recover the sum of $3,000, and also ordered that plaintiffs recover of defendant the sum of $1,457.95 for costs expended in the prosecution of their appeal. On the same day defendant paid to the clerk of the district court $103,000 and on September 17, 1959, it paid to the clerk costs of $1,457.95.

"On September 23, 1959, plaintiffs moved the district court to amend its judgment order of September 9, 1959 'by providing therein that the judgment shall bear interest at the rate of six per cent per annum from and after March 18, 1958, the date of the rendition of the verdict herein.'

"On October 19, 1959, this motion was withdrawn by plaintiffs without prejudice. According to a decision memorandum filed by the district judge, plaintiffs' counsel stated that 'since an application of *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, would preclude this court from granting the motion to amend the judgments by including interest, it was decided to withdraw the motion and thereafter institute an independent action in the state court.'"

The "decision memorandum" mentioned in the passage from the first opinion of the Court of Appeals quoted above is reprinted as Appendix VI to this Petition.

Thereafter Petitioners filed a suit in the Superior Court of Cook County, Illinois, in the nature of a common law action of debt on a judgment for interest that they claimed was due upon the verdicts as a matter of Indiana's sub-

stantive law. Petitioners have maintained since the inception of their suit in Illinois that the judgment of the district court of Indiana, implemented by Indiana's interest statute quoted above, entitles them to interest upon the amount of the verdicts, that that judgment is entitled to full faith and credit in Illinois and that the district court's judgment as implemented by Indiana statute needs no construction but that if it does, any court in the United States has the duty, and necessarily the power to construe it in order to accord it that full faith and credit.

Respondent, instead of defending the suit brought in Illinois' Superior Court, returned to the district court in Indiana that had pronounced the judgment. It prevailed upon that court to enter the injunctive decree of which review is sought by their petition.

That decree set forth as Appendix II to this Petition, retained Petitioners:

> "from taking any action whatever in said proceedings in the Superior Court of Cook County, State of Illinois except to dismiss the same, and the plaintiffs are further permanently enjoined from filing or causing to be filed in any Court, other than this Court, any suit in an attempt to litigate any issues arising out of the judgments entered herein in favor of the plaintiffs and against the defendant."

Petitioners appealed from this decree.

In the opinion of which review is sought on this Petition, the Court of Appeals held (1) that its first opinion, judgment and mandate in this case were *res judicata* that petitioners were not entitled to interest, (2) that petitioners' suit in Illinois for interest claimed under the Indiana statute amounted to an abandonment of petitioners' "the court which they had chosen," the federal courts and to an

expedition to "what seemed a greener field—a state court," that the district court's judgment terminated the case between plaintiffs and defendant but that although the case was thus "terminated," nevertheless the district court of Indiana retained *exclusive* jurisdiction to interpret that judgment and hence was justified in granting the decree appealed from by Section 2283 of the Judicial Code, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

I.

THE QUESTIONS PRESENTED BY THIS CASE ARE OF SUFFICIENT MOMENT TO ELICIT THIS COURT'S WRIT OF CERTIORARI.

Petitioners have brought suit against respondent in an Illinois Court of general common law jurisdiction to recover interest that they claim is due as a matter of Indiana's substantive law upon a judgment rendered in Indiana in a case where jurisdiction depends upon diversity of citizenship and in which the substantive rights of the parties are a matter of Indiana not Federal law.

Petitioners seek no amendment of the District Court's judgment. They contend that under that judgment, they are entitled to interest under Indiana's statute (Burns Indiana Statutes, Annotated, Vol. V, Part 2, Sec. 19-2002) which provides:

> "Interest on judgments for money, whenever rendered, shall be from the date of the return of the verdict or finding of the court, until the same is satisfied * * * at the rate of six (6) per cent per annum."

In *Hemstock* v. *Woods*, 122 Ind. App. 112, 44 N.E. 2d 1016, the Appellate Court of Indiana *en banc* considered a case in which the undisputed facts were as follows: On March 30, 1936, the Circuit Court of Lake County, Indiana, made "special findings of fact" including, *inter alia* a finding that the plaintiffs in that case were entitled to the sum of $44,600 representing indebtedness past due upon a mortgage recurring from this indebtedness, of which sum $33,000

represented the initial principle indebtedness and attorney's fees in the sum of $3,000, and $8,600 represented *contractual, not statutory* interests. The finding, however, was that the defendants owed the plaintiffs the composite, aggregate and undifferentiated sum of $44,600 on the mortgage.

The judgment of the Circuit Court of Indiana was silent on the matter of *statutory* at 6% per annum under the section of the Indiana statute quoted above.

Holding that the entire *judgment* bore interest *without amendment thereof* and *by operation of the statutory law*, the court said (44 N.E. 2d 1019):

> "While it would be good practice to provide in the judgment that it should bear interest from the date of the finding, such provision is not necessary, for the statute reads such provision into the judgment. *Lake Erie, etc., R. Co.* v. *Huffman*, 1912, 177 Ind. 126, 97 N.E. 434, Ann. Cas. 1914C, 1272; *Palmer* v. *Glover*, 1881, 73 Ind. 529

Even more incisive is the holding of the Supreme Court of Indiana in *Lake Erie, etc. R. Co.* v. *Huffman*, 1912, 177 Ind. 126, 97 N.E. 434, Ann. Cas. 1914C, 1272, in that case the trial court entered a judgment in an action for wrongful death. The judgment did not explicitly provide for interest. The plaintiff moved the trial court to modify the judgment so as to include statutory interest. The trial court *denied the motion.*

Nevertheless, the Appellate Court of Indiana held that the judgment bore interest as a matter of law, notwithstanding explicit denial of a motion to modify it.

The court said:

> "The overruling of the motion to modify the judgment could not have harmed appellant, for the statute

> read into such a judgment the right to collect interest thereon from the date of the verdict, and appellee was entitled to it notwithstanding the judgment did not by its terms provide for it." (97 N.E. 441)

In *Herd & Co.* v. *Crawill Machine Corp.*, 256 F. 2d 946, the Court of Appeals for the 4th Circuit held that the right to interest is a matter of Substantive law in a "civil suit within the diversity jurisdiction of the court," citing the *Tompkins* case.

We do not seek this court's writ of *certiorari* to review the concurrent decisions of a district court in Indiana and the Court of Appeals for the Seventh Circuit as to a matter of the law of Indiana even though it seems starkly clear that both courts erred in their reading of the Indiana law.

We seek this court's writ of *certiorari* to review the holding of the District Court that *whether Petitioner were right or wrong as to the effect of that court's judgment*, that court was the only forum in which its judgment might be construed.

What the district court actually held, with affirmance by the Court of Appeals in this case, was that Petitioners might not sue upon the District Court's judgment in a state court. In Illinois, in which the defendant was amenable to process and in which presumably it had the property subject to be taken in satisfaction of the judgment, because such a case would involve the interpretation of the district court's judgment.

If this holding is the law, its import is far-reaching. It amounts to saying that where a plaintiff has recovered a judgment in a United States District Court, it may not sue upon that judgment in any other court if any question is

raised as to the meaning of the judgment but must resort to the court that pronounced that judgment.

The District Court held, the Court of Appeals affirming, that the District Court had jurisdiction to enter this injunction under the provisions of Section 2283 of the Judicial Code:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

But a judgment of a United States District Court rendered in one State, in this case, the State of Indiana, must be given the same "full faith and credit" as it would be accorded had it been rendered by a court of Indiana of general jurisdiction, *Caterpiller Tractor Co.* v. *International Harvester Co.*, 120 F. 2d 82, and the sister State, in this case, Illinois, must enforce the district court's judgment as though it were a judgment of an Indiana court.

In *Stoll* v. *Gottlieb*, 305 U.S. 165, this court held that the Supreme Court of Illinois was bound to give full faith and credit to a judgment pronounced by a United States District Court in a reorganization proceeding in which the Federal court had jurisdiction of the parties and subject matter. Of course, if a State court must give full faith and credit to a judgment of a United States District Court, it must be *given an opportunity* to do so. It would be a strange rule that would at once compel and forbid a State court to give effect to the adjudications of Federal courts whether the State courts are sitting within or without the State in which the Federal court pronounced the judgment.

In *Ambassador Hotel Corp.*, 134 F. 2d 435, the decision of the Court of Appeals for the Second Circuit, Judges Lernard Hand, Swan and Chase concurring in an opinion by Judge Swan is very much in point. In that case a District Court had entered an order in the nature of a final judgment confirming a plan of re-organization for a hotel corporation. The plan included a voting trust approved by the District Court as a means of effectuating the object of the plan. Subsequent New York legislation would or might invalidate the voting trust were it not for the confirmation thereof by a Federal court. Confirmation of the plan would or might save the plan from the New York act.

A creditor of the re-organization had the corporation sued in the State court to assail the plan.

The District Court of Appeals held that the mere fact that the State court might have to consider the effect of a judgment of a United States District Court upon the validity of a plan neither ousted the State court's jurisdiction nor empowered the District Court to enjoin the parties from proceeding in the State court.

It is frequently necessary to construe judgments and decrees in order to give proper effect to them. We know of no general principle and of no decision save the one of which review is sought in this case that declares or even intimates that a State court of general jurisdiction may not enforce the judgments of Federal courts, whether rendered within or without the State in which the State court sits, even though the plaintiff invokes rather than assails the judgment upon which it sues. Nor do we know of any case, holding that a Federal court may restrain a suit in a State court upon the Federal court's

judgment merely because a construction of that judgment may be necessary.

The far-reaching import of the decree of the District Court in this case, particularly since that decree has been approved and affirmed by a United States Court of Appeals, should elicit certiorari in this case.

II.

THERE IS A DIRECT AND DIAMETRICAL CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS AS TO WHETHER BRIGGS v. PENNSYLVANIA R. CO., 334 U.S. 304 PERMITS OR FORBIDS THE COMPUTATION OF INTEREST ON A VERDICT OR JUDGMENT FROM A DATE EARLIER THAN THAT OF THE MANDATE OF A COURT OF APPEALS. THIS CONFLICT SHOULD EVOKE CERTIORARI SO THAT THIS COURT MAY RESOLVE IT.

The Court of Appeals for the Second Circuit has recognized in *Powers* v. *N.Y.C. R. Co.*, 251 F. 2nd 813 (1958), Judges Hincks and Waterman concurring and Lumbard dissenting, that there is a diametrical conflict in the teachings of the various Courts of Appeals as to whether this court's decision in *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, permits or forbids the computation of interest from a date earlier than that of a mandate of a Court of Appeals when the Court of Appeals reinstates a verdict or a judgment of a lower court.

In the *Powers* case, the Court of Appeals, holding that interest on a judgment for the plaintiff, in a suit under the Federal Employer's Liability Act could not be allowed from a date earlier than the date of its mandate, the court said at page 818:

> "*Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L.Ed. 1403, expressly left open the question now before us. 334 U.S. at page 307, 68 S. Ct. at 1040.

"Title 28 U.S.C.A. Sec. 1961 is controlling. It provides that interest on any money judgment 'shall be calculated from the date of the entry of the judgment * * *.' The Fifth Circuit has read that section as permitting the allowance of interest from a date earlier than the entry of judgment on the mandate of the court of appeals. *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 5 Cir., 142 F. 2d 847, 153 A.L.R. 851 (from date of verdict); *Givens* v. *Missouri Kansas-Texas R. Co. of Texas*, 5 Cir., 196 F. 2d 905 (from date of erroneous judgment); *Wright* v. *Paramount-Richards Theatres*, 5 Cir., 198 F. 2d 303 (from a date between verdict and entry of erroneous judgment). See 64 Yal Law J. 1019 at 1035 (1955).

"However, in this circuit the law is otherwise. *Chemical Bank & Trust Co.* v. *Prudence-Bonds Corp.*, 2 Cir., 213 F. 2d 443, certiorari denied, 348 U.S. 856, 75 S. Ct. 80, 99 L. Ed. 674."

The cases decisions of the Fifth Circuit, *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 5 Cir., 142 F. 2d 847, 153 A.L.R. 851 (from date of verdict); *Givens* v. *Missouri Kansas-Texas R. Co.*, 5 Cir., 196 F. 2d 905 (from date of erroneous judgment) and *Wright* v. *Paramount-Richards Theatres*, 5 Cir., 198 F. 2d 303 (from a date between verdict and entry of erroneous judgment), all hold that, notwithstanding this court's decision in the *Briggs* case, interest may be allowed from a date earlier than that of the mandate.

This conflict should be resolved by this Court.

III.

THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAVE SO FAR DEPARTED FROM THE APPLICABLE PRINCIPLES OF DECISION AS TO CALL FOR THIS WRIT OF CERTIORARI.

As we have noted in our Statement of the Case, *ante*, the District Court *rendered a judgment on the verdicts for petitioner* when they were returned but later set aside that judgment and granted a judgment for the defendant notwithstanding the verdict.

If this case is controlled by Section 1961 of the Judicial Code (28 U.S.C.A. 1961) the original judgments automatically bear interest at "the rate allowed by State law which is six per cent." Section 1961 of the Judicial Code is in full as follows:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State Law."

If, this being a case in which Federal jurisdiction is based upon diversity of citizenship and in which the Constitution therefore commands that the parties have the same substantive rights as they would have in a State court, so that the Indiana statute governs the judgments bear interest from the date of the verdicts.

Since the date of the verdicts and the date of the district court's first judgment for the Petitioners were the same, it makes no difference either as to the time from which or the rate at which interest is to be reckoned

whether the time and the rate are fixed by the Federal statute of, by the Indiana statute; for in either case the date, according to the Federal statute is the date of the judgment. In this case it is the same as the date of the verdicts and in either case, the rate of interest is "the rate allowed by State law", which is six per cent.

Since judgments notwithstanding the verdict and appeals thereform are common in the Seventh Circuit, as indeed they are in all circuits, this court should determine whether, when a judgment or verdict for a plaintiff is set aside by the District Court and reinstated on appeal, interest runs from the date of the judgment (under law so provides) from the date of the judgment (under Section 1961 of the Judicial Code) or from the date of the mandate, as the lower courts have held in this case.

IV.

BRIGGS v. PENNSYLVANIA R. CO., 334 U.S. 304, MUST BE DISTINGUISHED FROM THIS CASE BECAUSE THAT CASE AROSE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, A FEDERAL STATUTE, AND THIS CASE AROSE UNDER THE SUBSTANTIVE LAW OF INDIANA.

The *Briggs* case was a suit under the Federal Employers' Liability Act. In that case *all* of the rights of the parties, substantive, jurisdictional and procedural rights, were Federal rights.

In this case, however, the substantive rights of the parties were governed by the law of Indiana, the State in which the plaintiffs were injured and in which this case was tried and decided.

The judgments of the District Court and of the Court of Appeals in this case are insubordinate to the mandate of the Constitution declared in *Erie R. Co.* v. *Tompkins*,

304 U.S. 64, that the substantive rights of the parties are to be determined by the law of the State in which those rights accrued. Indiana's law commands a negligent tort feasor to pay interest on the award of damages from the date of the verdict. Indiana's statute as construed by Indiana courts reads this command into the judgment even though it is not expressed.

CONCLUSION.

For the reasons urged in this Petition, it is respectfully submitted that this court should grant the writ of certiorari to review and reverse the decree of the district court and the judgment of the Court of Appeals in this case.

Respectfully submitted,

JAMES A. DOOLEY,
Attorney for Petitioners.

APPENDIX I.

September 27, 1960

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Diversity actions for personal injuries sustained by Duane F. Lee and Margaret Lee, his wife, residents and citizens of Florida, against Terminal Transport Co., Inc., an Indiana corporation, were tried before the district court. On March 18, 1958, a jury returned verdicts for plaintiffs for $100,000 and $3,000 respectively, whereupon the court entered judgment for defendant notwithstanding the verdicts. Upon appeal, we reversed this judgment and remanded the case to the district court with instructions to reinstate the verdicts. *Lee v. Terminal Transport Co.*, 269 F. 2d 97.

This court's mandate issued accordingly and, on September 9, 1959, the district court vacated its prior judgment and, pursuant to the verdicts, entered judgment that plaintiff Duane F. Lee recover of defendant the sum of $100,000 and costs, and that plaintiff Margaret Lee recover the sum of $3,000, and also ordered that plaintiffs recover of defendant the sum of $1,457.95 for costs expended in the prosecution of their appeal. On the same day defendant paid to the clerk of the district court $103,000 and on September 17, 1959 it paid to the clerk costs of $1457.95.

On September 23, 1959, plaintiffs moved the district court to amend its judgment order of September 9, 1959 "by providing therein that the judgment shall bear interest at the rate of six per cent per annum from and after March 18, 1958, the date of the rendition of the verdict herein."

On October 19, 1959, this motion was withdrawn by plaintiffs without prejudice. According to a decision memo-

randum filed by the district judge, plaintiffs' counsel stated that "since an application of *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, would preclude this court from granting the motion to amend the judgments by including interest, it was decided to withdraw the motion and thereafter institute an independent action in the state court."

On January 4, 1960, the district court, on motion of defendant, entered an order permanently enjoining plaintiffs from proceeding with a lawsuit against defendant herein, which they had filed in the Superior Court of Cook County, Illinois, and enjoining them from filing in any court other than the district court "any suit in an attempt to litigate any issues arising out of the judgments entered herein in favor of the plaintiffs and against the defendant." A motion by plaintiffs to vacate this order was denied.

From the order entered January 4, 1960, plaintiffs have appealed to this court.

At all times relevant herein, an Indiana statute, §19-2002 Burns Indiana Statutes, Annotated, Vol. 5, Part 2, has provided:

> • • • Interest on judgments for money, whenever rendered, shall be from the date of the return of the verdict or finding of the court, until the same is satisfied • • • at the rate of six [6] per cent per annum.

Plaintiffs rely on this act in an attempt to require defendant to pay interest on their judgment from the date of the entry of the verdicts in the district court until September 9, 1959 when judgment thereon was entered and defendant paid to the clerk of the district court the principal amount of said judgment and said costs.

Although plaintiffs asked the district court to amend the judgment to include this interest item, they withdrew their motion and resorted to an independent action therefor in an Illinois state court.

(Appendix)

In the exercise of their jurisdiction in diversity cases, the federal courts have ample power to pass upon all matters incidental to any such case and it is neither necessary nor permissible for a litigant in such case to resort to a state court for relief as to any such matter. Plaintiffs invoked the jurisdiction of the federal courts when they sued defendant in a district court.[1] Their claim to interest from the date of verdicts of the date oof judgment was incidental to their case in the federal courts.[2] Their vacillation on whether they believed the district court had power to rule upon that claim of course could not strip the federal courts of their jurisdiction over a claim for interest on a federal court judgment.

By our judgment of June 29, 1959, we reversed the district court judgment against plaintiffs, remanding the case with instructions to reinstate the verdicts, and our mandate issued September 8, 1959, in accordance with our judgment. Neither the judgment nor the mandate referred to the subject of interest. Plaintiffs admit that in our court they never claimed that they were entitled to prejudgment interest.

Confronted with the decision in *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, which emphasizes the importance of the mandate of a court of appeals as limiting the action of a district court upon remandment, and realizing that their right to relief in the federal courts as to the prejudgment interest was jeopardized due to failure to assert it, plaintiffs left the courts which they had chosen and went to what seemed a greener field—a state court. However, a failure to assert a right in a federal court when a case

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[1] Plaintiffs their suit in the United States District Court for the Southern District of Florida from which it was transferred, by order of said court, to the United States District Court for the Northern District of Indiana, Hammond Division, pursuant to 28 U.S.C.A. § 1404(a).

[2] *Bunton* v. *United States*, 62 Fed. 171, 173; 47 C.J.S. 34.

involving that right is adjudicated does not justify a litigant's assertion of that right in a state court.

The judgment entered in the district court upon remandment by this court's judgment terminated the case between plaintiffs and defendant. To protect and effectuate that judgment and our judgment ordering remandment, it was necessary that the district court grant the injunctional order appealed from. Otherwise the interest question which was incidental to the case litigated by plaintiffs in the federal courts would have been carved out of the federal court judgment by plaintiffs and submitted to the Illinois state court.

Granting of the injunction was therefore authorized by 28 U.S.C.A. § 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

For these reasons, the order from which appeal has been taken is affirmed.

ORDER AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II.

MEMORANDUM OF DECISION

(Filed Dec 29 1959)

Defendant moves to enjoin plaintiffs from proceeding in a suit commenced in the Superior Court of Cook County, Illinois, wherein plaintiffs, referring to two money judgments granted in the instant action upon jury verdicts, seek to collect interest from the rendition of the verdicts.

The facts leading to the motion are these. Plaintiffs Duane F. Lee and Margaret Lee, his wife, residents of Florida, filed suit against Terminal Transport Company, Inc. in the Southern District of Florida. They sought damages for personal injuries arising from an automobile-truck collision which occurred near Carbondale, Indiana. The action was transferred to this district under Title 28, U.S.C. § 1404 (a). On March 18, 1958, jury verdicts were rendered for Mr. and Mrs. Lee in the sums of $1 0 and $3,000, respectively. Defendant's motion to set e the verdicts and to enter judgment consistent wit.. its motion for directed verdict was granted on June 30, 1958. Thereafter the judgment for the defendant n.o.v. was reversed on appeal, (269 F.2d 97), and a mandate issued from the Court of Appeals directing the court to reinstate the jury verdicts. In obedience thereof an order dated September 9, 1959 granted judgments to plaintiffs concordant with the verdicts. The order further provided that pursuant to the mandate plaintiffs recover $1,457.95, representing costs of the appeal. Defendant immediately paid into the registery of the court the total amount of the judgments. Plaintiffs however have not to date requested the Clerk to disburse these sums.

On September 23, 1959, plaintiffs moved to amend the order of September 9, 1959 to provide that the judgments

bear interest from the date of the verdicts. After briefs were filed, plaintiffs withdrew their motion to amend and on November 9, 1959, filed suit in the Superior Court of Cook County. The instant motion to enjoin plaintiffs from prosecuting that action followed.

During oral argument plaintiffs' counsel stated that since an application of Briggs v. Pennsylvania R. Co., 334 U.S. 304, would preclude this court from granting the motion to amend the judgments by including interest, it was decided to withdraw the motion and thereafter institute an independent action in the state court.

The question whether plaintiffs, if timely and proper application had been made, might be entitled to interest from date of verdict as provided by Section 19-2002 Burns Indiana Statutes is not the issue to be decided on this motion. The issue to be decided is whether the court has the power to enjoin plaintiffs from proceeding in the state court action and whether that power should on the facts be exercised.

It is contended that this court no longer has personal jurisdiction of plaintiffs because, judgments having been rendered, the case is thereby concluded. The answer to this contention seems clear. Defendant by its motion seeks to prevent plaintiffs obtaining through a plenary and independent suit a modification of the judgments entered in the case at bar. The object of the motion is to protect a judgment of this court. Consequently, the motion is supplementary so as not to require an independent jurisdictional basis. *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633 (1864); *Wayman* v. *Southard*, 23 U.S. (10 Wheaton) 1(1825); *Rio Grande Railroad Co.* v. *Gomila*, 132 U.S. 478 (1889). Plaintiffs, having brought themselves within the jurisdiction of the court, cannot now be heard to say that they are not amenable to a writ or order which may prohibit the impairment of the judgments as entered.

Aside from the question of jurisdiction over the plaintiffs, the problem arises as to the right of a federal court

to enjoin the prosecution of a state court action whereby a modification of the federal court's judgment or decree is requested. The question has been answered in a number of cases, all upholding the right of the federal court to enjoin such action. *Williams* v. *Pacific Royalty Co.*, 247 F.2d 672 (C. A. 10, 1957); *Bethke et al* v. *Grayburg Oil Co.*, 89 F.2d 536 (C. A. 5, 1937); *Berman* v. *Denver Tramway Corp.*, 197 F.2d 946 (C. A. 10, 1952); *Jacksonville Blow Pipe Co.* v. *Reconstruction Finance Corp.*, 244 F.2d 394 (C. A. 5, 1957). In the *Williams* case the court dealt with the question as follows:

> "The right of the Federal Court to enjoin the prosecution of a state court action to effectuate its judgment is not questioned. We have held that 'A federal court is clothed with power to secure and preserve to parties the fruits and advantages of its judgment or decree. In the appropriate exercise of that power, the court has jurisdiction through means of a supplemental proceeding to enjoin the relitigation in a state court of a matter litigated, determined and adjudicated by its valid decree regularly entered, if the result of the relitigation would be to destroy the effect of the decree rendered in the United States Court.' *Berman* v. *Denver Tramway Corp.*, 10 Cir., 197 F.2d 946, 950. See also *Jackson* v. *Carter Oil Co.*, 10 Cir., 179 F.2d 524, certiorari denied 340 U.S. 812, 71 S.Ct. 39, 95 L.Ed. 597." (247 F.2d 675).

In the case at bar the issue of whether the judgments have included interest could have been raised by plaintiffs and decided in the Court of Appeals. *Briggs* v. *Pennsylvania R. Co.*, *supra*. They chose not to present the issue in that court; their action in the state court is therefore in effect an attempt to litigate an issue that should have been presented in the manner outlined in the Briggs decision. Since the issue of interest was not presented by plaintiffs when they had an opportunity to do so, the doctrine of res adjudicata must be applied to the judgments

entered by this court pursuant to the mandate of the Court of Appeals. *Huddleston* v. *Dwyer*, 137 F.2d 383 (C. A. 10, 1943).

The motion for an injunction is granted. Defendant is directed to submit an appropriate form of decree.

Enter:

/s/ Luther M. Swygert
Judge

Hammond, Indiana
December 29, 1959

APPENDIX III.

CASTLE, Circuit Judge.

This diversity action was instituted by Duane F. Lee and Margaret Lee, plaintiffs-appellants (hereinafter referred to as plaintiffs) against Terminal Transport Company, defendant-appellee, (referred to as defendant) for damages alleged to have been sustained as the result of negligence of the defendant in the operation of a tractor-trailer motor truck which collided with the passenger automobile in which plaintiffs were riding. The jury returned verdicts for plaintiffs. Defendant moved for judgment notwithstanding the verdict or in the alternative for a new trial. The District Court entered judgment for the defendant and overruled the motion for a new trial.

Plaintiffs in their appeal contend that the court erred in entering judgment notwithstanding the verdict. Defendant in a cross appeal contends the court erred in denying the motion for new trial which was grounded on the court's rulings (1) refusing to permit defendant to show that a deposition read into evidence by defendant was taken by plaintiffs who failed to offer same in evidence, (2) in connection with instructions given and refused, and (3) in excluding the opinion of a police officer as to the place on the highway where the impact occurred.

The collision out of which this action arose happened about one and three-quarters miles north of Carbondale, Indiana, on U. S. Highway 41, a north and south highway. Plaintiffs, husband and wife, were traveling south. They were riding as guest passengers in a car driven by the husband's father and were seated in the back seat with their infant child. In addition to the driver, Lee, Sr., the front seat was occupied by his daughter and her son. The occupants of the front seat were killed in the collision.

At the time of the accident, about 4:00 A.M., Duane Lee was asleep and Margaret Lee was only partially awake. None of the occupants of the car could describe how the collision occurred. It was a clear chilly night and the roadway was dry. The highway was surfaced with black top. It was 22½ feet wide except where it crossed a creek the roadway narrowed to 19½ feet between the bridge bannisters. The center of the highway was marked with a double yellow line. There were hills both to the north and the south of the bridge. The north hill's apex, 30 feet above the bridge level, was 1200 feet north of the bridge. The south hill's apex, 20 feet above the bridge, was 800 feet south. Both to the north and the south of the bridge there were "Slow" and "Narrow Bridge" highway signs on each side of the roadway.

Defendants' vehicle was travelling north. The trailer was from 12 to 12½ feet high, 25 feet in length and 7 feet wide. It was loaded with about 18,000 pounds on each of the two axles. The trailer body and outside dual wheels projected about one foot beyond the tractor wheels.

The vehicles collided at a point 165 feet north of the bridge. The physical damage to each vehicle was at the right front portion.

[1-4] Plaintiffs appeal presents the single question of whether there was any evidence to support the jury's findings that negligence of the defendant was the proximate cause of the collision and resulting injuries and damage. Since plaintiffs were guest passengers the negligence, if any, of the driver may not, under the law of Indiana, be imputed to them. *Constantine* v. *Pennsylvania R. Co.*, 7 Cir., 114 F. 2d 271. If there was any evidence which, together with all the reasonable inferences that might be drawn therefrom, supports plaintiffs' case, the trial judge erred in substituting his conclusions for those of the jury, since the jury is the proper tribunal to decide that issue. *Stanford* v. *Pennsylvania R. Co.*, 7 Cir., 171 F. 2d 652;

(Appendix)

Smith v. *J. C. Penney Company*, 7 Cir., 261 F. 2d 218; cf. *Vandalia R. Co.* v. *Parker*, 61 Ind. App. 146, 111 N.E. 637; *Compton* v. *Benham*, 44 Ind. App. 51, 85 N.E. 365. In considering a defendant's motion for judgment notwithstanding the verdict the proof must be considered in the light most favorable to plaintiff. *Sivert* v. *Pennsylvania R. Co.*, 7 Cir., 197 F. 2d 371; *Cole* v. *American Bridge Co.*, 7 Cir., 152 F. 2d 157; *Mescall* v. *W. T. Grant Co.*, 7 Cir., 133 F. 2d 209.

There were conflicts in the testimony in the instant case, but considering that evidence most favorable to plaintiffs' case the jury was warranted in concluding that defendant's tractor-trailer came down the hill south of the bridge at a speed of from 50 to 60 miles an hour, which was in excess of the 45 mile per hour speed limit applicable to such vehicle under Indiana law; that the vehicle was over the center line and partially in the south bound traffic lane, occupying five-eights of the roadway. A disinterested witness, riding in a southbound car preceding the Lee vehicle so testified. He further stated that the driver of this vehicle suddenly applied the brakes and pulled over partially on the shoulder some ten feet north of the bridge and waited for defendant's truck to pass. That just before the collision he saw the light of the Lee car swerve off toward the north bound traffic lane. Another witness riding in the preceding car testified that the Lee car travelling at about 60 miles per hour was from 50 to 100 yards behind. Defendant's exhibit 7, a photograph portraying gouge marks on the highway surface where the impact occurred also showed skid marks, admitted by defendant's driver to have been made by his tractor-trailer, which were well over the center line and into the south bound lane.

It is our opinion that this evidence and inferences which might reasonably be drawn therefrom are sufficient to sustain the action of the jury in returning the verdict it did. It may well have concluded that defendants tractor-trailer was over in the south bound lane as it approached the Lee

car at great speed and that the driver of the Lee car swerved to his left toward the north bound lane in an unsuccessful attempt to avoid a collision.

We therefore hold that there was proof which, when considered in a light most favorable to plaintiffs, sustains the jury's findings and verdict and that the trial court erred in entering judgment notwithstanding the verdict.

[5-7] This conclusion requires that we consider the contentions advanced by defendant on its cross-appeal from the motion denying a new trial. On that phase of the case we hold that the trial court did not err in refusing to permit defendant to identify the deposition it read into evidence as having been taken by plaintiffs. It is our further view that the instructions given adequately covered the applicable legal principles. In any event the feature defendant complains was omitted was not covered in any instruction tendered by defendant and refused. Consequently defendant is not in a position to complain on appeal. *Dallas Ry. & Terminal Co.* v. *Sullivan,* 5 Cir., 108 F. 2d 581. Nor was the exclusion of the opinion of the police officer as to the place on the highway where the impact occurred, error. *Padgett* v. *Buxton-Smith Mercantile Co.*, 10 Cir., 262 F. 2d 39. The denial of a new trial is affirmed.

The case is therefore reversed and remanded with directions that the District Court reinstate the verdicts of the jury.

Reversed and remanded.

APPENDIX IV.

Entry for March 18, 1958.

Pursuant to the verdicts of the jury, judgment is now entered for the plaintiff Duane F. Lee, against the defendant, for the sum of $100,000;

Judgment is further entered for the plaintiff Margaret Lee, against the defendant, for the sum of $3,000.

Luther M. Swygert
Judge.